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Exorcising the ghost in the Wills Act

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4. Exorcising the ghost in the Wills Act

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Ingenious lawyers all over the Commonwealth are dreaming up rigmaroles for the signing of wills amid the pandemic. An English law firm has suggested that the will should be signed at a park bench, with witnesses lurking nearby, ready to rotate around the document. Another option allows for the will to be signed at the person's doorway while the witnesses stand outside, using the services of a well-trained pet to deliver the signed will to the witnesses.

Singapore has passed many sensible temporary measures in response to COVID-19 disruption, including marrying couples remotely so that the newly-weds, witnesses and solemniser need not be physically present. Yet, such proximity remains required for an important life admin – the execution of a valid will.

Like many Commonwealth countries, Singapore's Wills Act mandates the presence and signatures of two witnesses, neither of whom are beneficiaries, making the process of executing a valid will onerous during this time.

The current law is doing a disservice to people who want to sort out their affairs – especially during a time when life is potentially more fragile. Demand for will writing in the UK has reportedly jumped by 76 per cent. Here, fewer than 15 to 20 per cent of Singaporeans are estimated to have made a will.

Why wills are important

A cynical reader may be thinking that making a will might be unnecessary because his estate would be dealt with automatically under the Intestate Succession Act upon death. However, intestacy – that is, not having made a will before one dies – is far from ideal. It causes delay and stress to surviving family members and may have unintended consequences. If a person leaves behind a spouse and child, the estate will go entirely to them, excluding his parents. This might not be what he would have wanted, especially if he had always taken care of his parents financially.

Recently, I was consulted over the affairs of a distant relative who had died intestate. He had a long-term partner, whose child he had considered to be his own despite there being no adoption. Under the laws of intestacy, they did not stand to inherit any of his property. Also, getting probate

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(or establishing legal validity) over his estate was formidable and expensive. All his five siblings, one of whom is currently overseas, had to file court documents to appoint an administrator. For siblings who passed away, death certificates had to be produced to the court. All these complications and expenses would have been unnecessary if only he made a will.

Why the law is designed this way

The law's insistence for the physical presence of two witnesses may be explained on the basis that it protects a person from fraud and coercion when signing a will. Lawyers, being creatures of tradition, have not seen it fit to change this law, which dates to the Victorian era.

But does this rationale still hold water in this time where video conferencing – even in High Court hearings – is ubiquitous? Why is the remote presence of witnesses not allowed? Is the rule which requires the physical presence of two witnesses, ultimately, merely a ghost from the past that is no longer relevant?

If so, the rule should be modified. As a wise judge once said in another context "[w]hen these **ghosts of the past** stand in the path of justice clanking their mediaeval chains the proper course… is to pass through them undeterred."

And why the law needs to change

To facilitate the execution of valid wills, a temporary measure should be passed, like the solemnisation of marriages, to allow for a will to be executed with witnesses present remotely. Safeguards could be built to protect a person from fraud or coercion by insisting that a will may be executed by him only under his lawyer's remote supervision with the remote presence of two witnesses.

An additional safeguard could be to insist that the execution process and the signed document be recorded by high-definition video. Singapore would not be the first country to introduce such a temporary measure. Some countries like Australia, Canada and New Zealand, and many states in the United States, have allowed for witnesses and officials to appear by audio-video technology rather than in person. If such a temporary measure does not lead to further litigation, a strong case may be made that remote presence of witnesses should be allowed permanently.

Another casualty of the law mandating physical witnesses is the recognition of electronic wills. While revamping the law of wills that has stood close to nearly 200 years is a bold move, it is ultimately necessary to take into account the digital age that we live in. Several states in the United

States like Arizona, Florida, Nevada and Indiana have already enacted legislation allowing for electronic wills. In fact, the Uniform Law Commission has approved and recommended for enactment the Uniform Electronic Wills Act in the United States. The UK Law Commission has also recently issued a consultation paper calling for views on enacting enabling legislation to cater for electronic wills.

Since the technology in relation to electronic wills may be developing, Singapore's legislation may be drafted based on broad principles. First, and foremost, electronic signatures must be secure. Second, the legislation should not unduly prescribe the technology used because this might stifle innovation and commercial incentives to develop the necessary technology. Finally, any technology developed for electronic will-making must provide for a central repository that is safe from hacking, with access given to interested Government departments. The balance between these principles could be struck by conferring on the Minister of Law the power to recognise relevant technology that meets these criteria by way of subsidiary legislation.

The only good thing that has come out from this pandemic is that it has accelerated digital transformation in many organisations and our daily lives. In the age of ubiquitous smartphones and Wi-Fi, it does not make sense for us to be bound by an antiquated law that insists on physical proximity and pen on paper. Just as one can conclude and sign a multimillion-dollar contract electronically, one should also be able to execute a will digitally, with the proper safeguards built in.

While Singapore prides itself on being progressive in technology use in all life aspects, it seems strange that we have not modernised our laws in relation to technology and end-of-life planning issues. The Wills Act should be amended in a way that gives people the opportunity to make their wills in an accessible, convenient and secure manner.